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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ABDUL MAJEED ASKIA,

Defendant and Appellant.

B290450

(Los Angeles County
Super. Ct. Nos. MA063233,
ZM023948)

APPEAL from a judgment of the Superior Court of Los Angeles County, Debra R. Archuleta, Judge. Affirmed as modified, and remanded with directions.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Abdul Majeed Askia repeatedly stabbed his friend with a knife, and he either stomped on her neck or strangled her until she became unconscious. A jury convicted defendant of willful, deliberate, and premeditated attempted murder and assault with a deadly weapon.

On appeal, defendant challenges the judgment of conviction arguing the trial court should have granted his motion for a new trial, the trial court erred in not instructing jurors on imperfect self defense, and the finding that the attempted murder was committed willfully, deliberately, and with premeditation was not supported by substantial evidence.

Defendant does not demonstrate that he was entitled to a new trial based on newly discovered evidence because the evidence would not have affected the outcome of the trial. No evidence supported defendant's theory of imperfect self defense. Accordingly, the trial court properly declined to instruct the jury on that defense. Viewed through the lens of the proper standard of review, ample evidence supported the finding that defendant willfully, deliberately, and with premeditation attempted to murder his victim.

Defendant raises several issues with respect to his sentence. We agree that the judgment on the assault charge should be modified to impose and stay sentence on that charge and the Penal Code section 12022.7 great bodily injury enhancement. We also agree that the judgment on the attempted murder charge should be modified to strike the Penal Code section 10222, subdivision (b)(1) dangerous weapon enhancement. We, however, conclude defendant has failed to demonstrate he would be eligible for diversion under the newly

enacted Penal Code section 1001.36 even if that statute were retroactive—an issue we need not decide.

Defendant also argues that pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), we should remand for a hearing to determine his ability to pay the fines and fees imposed on him at his sentencing hearing. Following *People v. Gutierrez* (2019) 35 Cal.App.5th 1027 (*Gutierrez*), we conclude that defendant forfeited this issue by failing to raise it in the trial court.

FACTUAL BACKGROUND

On June 7, 2014, defendant,¹ Quiana Beavers, and Beavers’s six-year-old daughter lived in the same home. They rented space from Paul Reynolds. On that day, defendant accompanied Beavers and her daughter to visit Beavers’s grandmother. Upon their return, defendant and Beavers argued. Beavers believed the argument stemmed from defendant’s jealousy.

Reynolds overheard defendant and Beavers arguing. Reynolds left the house to visit someone next door. When he returned, he observed a knife on the kitchen counter and heard Beavers say to the defendant: “[O]h now you fixing to get the knife and stab me.” Reynolds told defendant to put the knife down. Reynolds left the house again, and when he returned, Beavers was lying on the floor surrounded by blood. The only other person in the house was Beavers’s young daughter.

¹ Defendant uses the following alias names: Darnell Steve Lowe, Done Lowe, Donnell Lowe, Frankie Lowe, Robert Sims, Robert Lee Wilcox, D. Robert Lee Wilcox, Donald Lowe, Donel Lowe, Frank Donnell Lowe, James Motley, Donell Towe.

Later that night, defendant went to the Palmdale Sheriff's Station. Defendant told Lieutenant Belinda Johnson that he was the victim of an assault. When questioned about the assault, defendant said someone broke the windows to his vehicle. Defendant did not report that Beavers assaulted him.

Defendant told Lieutenant Johnson that he wanted to "turn himself in" because he "may have done something that he may be arrested for." Defendant had blood on the front of his shirt and abrasions on his knuckles. Later that evening, Deputy Sheriff Erich Marbach observed that defendant was not injured.

Beavers suffered numerous, severe injuries. Her injuries were consistent with strangulation or with someone stomping on her neck and applying pressure to her neck. Specifically, blood vessels around her eyes had burst and she had bruises under the left side of her jaw. Vertebrae in her cervical spine were fractured. Additionally, Beavers had two stab wounds in her left breast, as well as a stab wound behind her left shoulder. Beavers suffered a laceration in her left foot. After she regained consciousness, Beavers spent two months in the hospital and required physical therapy. At the time of trial, Beavers still suffered pain. She did not remember the stabbing, the strangulation, or the events immediately preceding them.

PROCEDURAL BACKGROUND

In a two-count information, the People charged defendant with attempted murder and assault with a deadly weapon. The People alleged that the attempted murder was committed willfully with premeditation and deliberation. The People alleged that defendant used a deadly and dangerous weapon in the commission of the attempted murder (Pen. Code,² § 12022, subd. (b)(1)). With respect to both counts, the People alleged defendant inflicted great bodily injury on Beavers (§ 12022.7, subd. (a)). The People also alleged defendant suffered a prior conviction for murder within the meaning of the “Three Strikes” law.³

Prior to trial, the trial court found defendant incompetent to stand trial. Defendant spent time at Patton State Hospital. Hospital personnel indicated defendant exhibited features consistent with narcissistic personality disorder and antisocial personality disorder. Other reports indicated that defendant suffered from a delusional disorder, persecutory type. Ultimately the staff at Patton hospital reported: “Please note that although Mr. Askia has been returned to DSH-Patton numerous times on his instant offense, his primary difficulty in cooperating with counsel is due to his Antisocial Personality Disorder.” Defendant’s “issues are characterological as opposed to

² Unless indicated otherwise all future statutory references are to the Penal Code.

³ The trial court granted the prosecutor’s motion to dismiss other allegations in the complaint.

psychiatric.” Defendant did not believe that he suffered from a mental disorder.

Defendant did not testify at trial, and no witness testified for the defense. The trial court denied defense counsel’s request for an instruction on self defense.

Jurors were instructed on heat of passion voluntary manslaughter as a lesser included offense. That instruction provided in part that “[t]he attempted killing was a rash act done under the influence of intense emotion that obscured the defendant’s reasoning or judgment.” Jurors were instructed: “The People have the burden of proving beyond a reasonable doubt that the defendant attempted to kill someone and was not acting as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of attempted murder.”

In a bifurcated proceeding, jurors convicted defendant of all charges. The trial court found defendant previously had been convicted of murder.

Defendant filed a motion for a new trial based on the testimony of Deputy Sheriff Avran Rodriguez. Rodriguez testified during defendant’s trial. Rodriguez testified that on June 7, 2014, he reported to Reynolds’s house. He observed a knife in front of the home, and the handle on the knife was broken. A photograph of the knife was shown to jurors. Rodriguez also testified that the blade was hidden under rocks. Deputy Sheriff Erich Marbach also testified that he saw the knife near the front door. Although initially Marbach testified the handle was not broken, he later corrected his testimony. Marbach entered the knife into evidence. After trial, the prosecutor and defense counsel learned that during defendant’s

trial, the Los Angeles Times had included Rodriguez in an article about officers who had committed misconduct. The trial court denied defendant's motion for a new trial, finding that Rodriguez's testimony was not material.

For the attempted murder charge, the trial court sentenced defendant to life in prison with a minimum of 14 years before defendant would be eligible for parole. The trial court imposed an additional consecutive five-year sentence pursuant to section 667, subdivision (a)(1) and an additional consecutive three-year sentence pursuant to section 12022.7, subdivision (a). The trial court did not impose sentence on count 2—the assault with a deadly weapon charge. The trial court indicated it was staying sentence on the assault pursuant to section 654. The trial court also did not impose sentence on the section 12022.7 enhancement connected to the assault. The trial court also indicated that it was staying the section 12022, subdivision (b)(1) enhancement (deadly and dangerous weapon).

The trial court ordered defendant to pay the following: a \$5,000 restitution fine, a \$40 court operations assessment (§ 1465.8), a \$30 assessment (Gov. Code, § 70373), and a parole revocation fine of \$5,000 (which was stayed pending successful completion of parole).⁴ The trial court also ordered defendant to pay victim restitution in the amount of \$10,000 and ordered that such restitution be deducted from defendant's prison wages. Defendant did not object to any of the fines or fees.

⁴ The abstract of judgment reflects a \$40 court operations assessment consistent with section 1465.8, subdivision (a)(1). The reporter's transcript incorrectly identifies a \$50 assessment.

DISCUSSION

A. The Trial Court Properly Denied Defendant's Request for An Instruction on Imperfect Self Defense

At trial, defendant argued that he was entitled to an instruction on imperfect self defense because he told Lieutenant Johnson that he was assaulted. The trial court denied defendant's requested instruction finding no evidence that he acted in imperfect self defense. On appeal, defendant points out that Beavers testified that on a prior occasion, she swung a dust pan and broom at defendant. On a prior occasion, Beavers knocked the mirror off of defendant's car. No evidence suggested that Beavers committed these acts shortly before or even on the same day on which defendant stabbed and strangled Beavers.

A trial court is required to instruct on a lesser included offense supported by substantial evidence. (*People v. Duff* (2014) 58 Cal.4th 527, 561.) "The duty applies whenever there is evidence in the record from which a reasonable jury could conclude the defendant is guilty of the lesser, but not the greater, offense." (*Ibid.*) "Perfect self-defense requires that a defendant have an honest and reasonable belief in the need to defend himself or herself." (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.) "Imperfect self-defense . . . arises when a defendant acts in the actual but unreasonable belief that he is in imminent danger of death or great bodily injury." (*People v. Duff*, at p. 561.)

Here, there was no evidence that *at the relevant time* Beavers assaulted defendant or acted aggressively towards him. Evidence that Beavers may have tried to hit him with a broom or vandalized his car on other days is insufficient to warrant an instruction on imperfect self defense. That theory requires that defendant believed he needed to defend himself when he

committed the attempted murder. (*People v. Duff, supra*, 58 Cal.4th at p. 561.) There was no evidence that at that time, Beavers engaged in any conduct that led defendant to believe that he was in imminent danger. Nor was there any evidence that defendant actually believed he was in imminent danger.

Evidence that defendant told Lieutenant Johnson he had been assaulted was insufficient to trigger an imperfect self defense instruction. Defendant did not describe the assault as occurring prior to his attempted murder of Beavers. Nor did he describe Beavers as the assailant. He simply described the assault as causing damage to his car. This evidence is insufficient to raise an inference that defendant believed he was in imminent danger when he stabbed and strangled Beavers. Although defendant states that he “introduced circumstantial evidence of his actual fear based on Beavers’s prior treatment of him,” he cites no such evidence from the trial and the record does not support his assertion. The trial court properly denied giving an instruction on imperfect self defense.⁵

B. Substantial Evidence Supported the Conclusion that Defendant Acted Willfully, Deliberately, and With Premeditation when He Attempted to Murder Beavers

Defendant challenges the sufficiency of the evidence to support the jury’s finding he committed the attempted murder willfully, deliberately, and with premeditation. “When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most

⁵ Because defendant demonstrates no error, we need not consider his argument that the error was prejudicial.

favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] . . . [A] reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] ‘This standard applies whether direct or circumstantial evidence is involved.’ ” (*People v. Avila* (2009) 46 Cal.4th 680, 701 (*Avila*).)

“ ‘ “Deliberation” refers to careful weighing of considerations in forming a course of action; “premeditation” means thought over in advance. [Citations.]’ [Citation.]” “ ‘ “Premeditation and deliberation can occur in a brief interval. ‘The test is not time, but reflection. “Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.” ’ ” [Citation.]’ ” (*People v. Solomon* (2010) 49 Cal.4th 792, 812.)

The following evidence amply supported the jury’s finding that defendant acted willfully and with premeditation and deliberation. Prior to the stabbing, Beavers asked defendant if he was going to stab her with the knife. Defendant did not pick up a knife then but later must have retrieved the knife that he used to stab Beavers repeatedly. Defendant either refused Reynolds’s request to leave the house, or if he left the house, defendant returned shortly afterwards. Defendant had time to contemplate his conduct. He had been arguing with Beavers for a period of time prior to attempting to murder her.

The manner of the attempted killing also supported the conclusion that defendant acted willfully and with premeditation and deliberation. The use of two methods of inflicting potentially

deadly harm supported premeditation and deliberation. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [finding evidence of strangulation and stabbing supported premeditation and deliberation].) Defendant repeatedly stabbed Beavers's torso. Further, he either stomped on her neck or strangled her and fractured multiple cervical vertebrae.

Defendant also took time to inflict numerous wounds and continued his attack until Beavers lay unconscious. In short, evidence defendant planned the attack by retrieving a knife and persisted in the attack until Beavers lay unconscious in a pool of blood supported the jury's finding that the attempted murder was committed willfully, deliberately, and with premeditation. (*People v. Thomas* (1992) 2 Cal.4th 489, 516–517.)

Defendant's argument in support of a different finding fails to consider the evidence in the light most favorable to the jury verdict. For example, defendant incorrectly asserts "[t]here is no[] link between appellant's actions and the fact that Beavers was stabbed." The jurors concluded just the opposite; they concluded defendant stabbed Beavers with a knife, causing her great bodily injury. The fact that on prior occasions Beavers may have assaulted defendant is not probative of defendant's mental state before and during his brutal stabbing of Beavers. Defendant characterizes his conduct as an "explosion of violence," but jurors expressly rejected the theory that he acted in the heat of passion.⁶

⁶ Defendant's reliance on *People v. Anderson* (1968) 70 Cal.2d (*Anderson*) is misplaced. Our Supreme Court more recently has held that "[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts

C. The Trial Court Did Not Err in Denying Defendant's Motion for a New Trial

1. Additional background

After jurors convicted defendant, he moved for a new trial on the ground of newly discovered evidence. The motion was based on the following undisputed facts: On December 6, 2017, Deputy Sheriff Abran Rodriguez testified. Two days later, the Los Angeles Times reported that Rodriguez had a history of misconduct. Specifically, a court found that Rodriguez had lied to investigators. The investigators were investigating allegations that Rodriguez asked a visitor at a correctional facility to show him her breasts. Defense counsel did not learn of the article until December 13, 2017 when the prosecutor told defense counsel about it.

Defendant argued that the evidence was material to whether he acted willfully, deliberately, and with premeditation. Counsel contended Rodriguez was the only witness to testify that the knife was found hidden under rocks. Counsel argued the evidence of Rodriguez's prior misconduct was "relevant to show

in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way." (*People v. Thomas, supra*, 2 Cal.4th at p. 517.) In any event, the three *Anderson* factors—planning, motive, and manner—support the finding of premeditation and deliberation in this case. (*Anderson*, at pp. 26–27.) Defendant planned the attack by obtaining a knife; was motivated by his jealousy over Beavers; and executed a brutal attack, refusing to stop until Beavers was unconscious.

that his credibility regarding where and how he found the knife is lacking.”

The trial court denied defendant’s motion for a new trial. The court reasoned that Rodriguez’s testimony did not affect the outcome of the proceedings. The trial court emphasized the undisputed evidence that defendant stabbed Beavers multiple times. The court also emphasized the overwhelming evidence against defendant.

2. Defendant does not show the information reported in the Los Angeles Times would have produced a different result

A defendant moving for a new trial based on newly discovered evidence must show that the evidence is “such as to render a different result probable on a retrial.” (*People v. McDaniel* (1976) 16 Cal.3d 156, 178.) We review the trial court’s decision for abuse of discretion. (*Id.* at p. 177.)

On appeal, defendant argues Rodriguez’s testimony was material because jurors “could have” found “that by transporting the knife from the kitchen to the front of the home and that by hiding the knife” defendant acted with deliberation and premeditation. According to defendant, “[t]he jury may have concluded that without the deliberate placement and concealment of the knife that appellant did not act willfully and with deliberation and premeditation.”

Defendant’s argument is not persuasive because jurors had to conclude whether defendant acted willfully with deliberation and premeditation *when* he repeatedly stabbed Beavers. Jurors were instructed that “defendant acted willfully if he intended to [kill] *when* he acted. The defendant deliberated if he carefully weighed the considerations for and against his choice and,

knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill *before completing the act* of attempted murder.” (Italics added.) Even if postcrime evidence may bear on defendant’s intent (see *People v. Thompson* (2010) 49 Cal.4th 79, 113), the evidence defendant hid a knife was not such as to render a different result probable on retrial.

The strong evidence of premeditation and deliberation summarized above and ignored by defendant also undermines his argument. Even if defendant could have impeached Rodriguez, Rodriguez’s testimony was of such minimal import in light of the entire case, that any such impeachment would not have affected the outcome of the trial. In short, the trial court acted well within its discretion in denying defendant’s request for a new trial.⁷

D. Defendant Does Not Qualify for Treatment Under Newly Enacted Section 1001.36

Defendant argues that section 1001.36 applies retroactively to him and that the case should be remanded for the trial court to determine whether defendant should be placed in pretrial diversion. We need not decide whether section 1001.36 applies retroactively to defendant because he does not show that he would qualify for treatment under that statute.

⁷ The test for a “*Brady* violation” (*Brady v. State of Maryland* (1963) 373 U.S. 83) is similar; the defendant must show a reasonable probability that the suppressed evidence would have changed the outcome of trial. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042–1043.) We need not consider whether a *Brady* violation occurred because defendant cannot show a reasonable probability the evidence would have produced a different verdict.

Section 1001.36, subdivision (b)(1) governs pretrial diversion and applies when the following criteria are established:

“(A) The court is satisfied that the defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. Evidence of the defendant’s mental disorder shall be provided by the defense and shall include a recent diagnosis by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant’s medical records, arrest reports, or any other relevant evidence. [¶] (B) The court is satisfied that the defendant’s mental disorder was a significant factor in the commission of the charged offense. A court may conclude that a defendant’s mental disorder was a significant factor in the commission of the charged offense if, after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant’s mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense, the court concludes that the defendant’s mental disorder substantially contributed to the defendant’s involvement in the commission of the offense. [¶] (C) In the opinion of a qualified mental health expert, the defendant’s symptoms of the mental disorder motivating the criminal behavior would respond to

mental health treatment. [¶] (D) The defendant consents to diversion and waives his or her right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment pursuant to clause (iv) of subparagraph (B) paragraph (1) of subdivision (a) of Section 1370 and, as a result of his or her mental incompetence, cannot consent to diversion or give a knowing and intelligent waiver of his or her right to a speedy trial. [¶] (E) The defendant agrees to comply with treatment as a condition of diversion. [¶] (F) The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. The court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate." (§ 1001.36, subd. (b)(1).)

Defendant contends that he "qualifies for consideration under section 1001.36(a), and since his judgment of conviction was not final at the time section 1001.36(a) was enacted, it should apply retroactively to his case." Later, defendant states that he "has a qualifying disorder" and notes that he was found incompetent to stand trial.

Defendant, however, never identifies his purported qualifying disorder, the first criterion. In addition, a report from Patton State Hospital indicated that defendant suffered from antisocial personality disorder, a disorder excluded from eligibility. (§ 1001.36, subd. (b)(1)(A).) Thus, defendant has not demonstrated that he has a qualifying mental disorder.

Section 1001.36 requires that “the defendant’s mental disorder was a significant factor in the commission of the charged offense.” (§ 1001.36, subd. (b)(1)(B).) Defendant identifies no basis to conclude that his mental disorder was a significant factor in the commission of the crimes involving Beavers. Even if he suffered from a delusional disorder, there was no evidence that this disorder was a factor (let alone a significant factor) in the commission of the charged offense.

Finally, in order for defendant to qualify for diversion, the trial court must be “satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community.” (§ 1001.36, subd. (b)(1)(F).) Section 1170.18 describes “unreasonable risk of danger to public safety as “an unreasonable risk that the petitioner will commit a new violent felony.” (1170.18, subd. (c).)

The record shows that it would be futile to remand for the trial court to make this determination. The trial court stated: “The court listened carefully to the evidence presented and the testimony of the victim in this case, and she basically came within inches of losing her life.” The court later indicated that defendant “almost took the child’s mother from her.” Jurors found that defendant personally used a deadly weapon and personally inflicted great bodily injury. Moreover, the trial court found that defendant suffered a prior conviction for murder. These circumstances show that the trial court would not have concluded that defendant would not “pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community.” (§ 1001.36, subd. (b)(1)(F).) In short, even if section 1001.36 were retroactive, defendant fails to show he would qualify for diversion under that statute.

E. Sentencing Issues

As the parties agree, upon remand, the trial court must consider whether to strike a five-year term pursuant to section 667, subdivision (a)(1). Prior to January 1, 2019, trial courts had no authority to strike a serious felony prior under section 667, subdivision (a)(1). (*People v. Jones* (2019) 32 Cal.App.5th 267, 272.) Courts now have that discretion, and the new statute applies retroactively. (*Ibid.*) Because the record does not conclusively demonstrate how the trial court would have exercised its discretion, remand is required. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

Further, as the parties agree, the court erred in failing to pronounce sentence on the assault and its concomitant enhancement. Even though the court indicated that section 654 applied, the correct procedure is first to impose and then stay the sentence. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1466.) The trial court must also impose and stay the section 12022.7, enhancement. (Cf. *People v. Guilford* (1984) 151 Cal.App.3d 406, 411–412.) The sentence pronounced by the trial court was unauthorized. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327.) The parties further agree that the trial court should have stricken rather than stayed the section 12022, subdivision (b)(1) enhancement. (See *People v. Jones* (2007) 157 Cal.App.4th 1373, 1383 [trial court has discretion to strike section 12022, subdivision (b) enhancement].)

F. Defendant Forfeited His Challenge to the Fines and Fees Based on His Alleged Inability to Pay

Finally, in a supplemental brief, defendant argues that the trial court erred in imposing the following fines without holding a hearing on defendant's ability to pay those fines: a \$5,000 victim restitution fine, a \$40 court operations assessment, and a \$30 court facilities assessment. Without citation to the record, defendant states that he lacks the ability to pay them.⁸ Defendant relies on *Dueñas, supra*, 30 Cal.App.5th 1157.

In *Dueñas*, the trial court imposed on the defendant certain assessments and a minimum restitution fine. The court rejected the defendant's argument that imposition of the assessments and the fine without consideration of her ability to pay them violated her constitutional rights to due process and equal protection. (*Dueñas, supra*, 30 Cal.App.5th at p. 1163.)

The Court of Appeal reversed, holding that "the assessment provisions of Government Code section 70373 and . . . section 1465.8, if imposed without a determination that the defendant is able to pay, are . . . fundamentally unfair[, and] imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Dueñas, supra*, 30 Cal.App.5th at p. 1168.) The imposition of a minimum restitution fine without consideration of the defendant's ability to pay also violated due process. (*Id.* at pp. 1169–1172.) The court reversed

⁸ Indigency is a question of fact. (*In re Siegel* (1975) 45 Cal.App.3d 843, 847, overruled on another ground in *People v. Romero* (1994) 8 Cal.4th 728, 744, fn. 10.)

the order imposing the assessments and directed the trial court to stay the execution of the restitution fine “unless and until the People prove that [the defendant] has the present ability to pay it.” (*Id.* at pp. 1172–1173.)

Here, the Attorney General contends defendant forfeited any challenge to the assessments and fine by failing to object or raise that issue below. This general rule is well-settled. (See, e.g., *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *Avila, supra*, 46 Cal.4th at p. 729; *People v. McCullough* (2013) 56 Cal.4th 589, 597.) Defendant argues, however, that the forfeiture rule should not apply because his sentencing occurred prior to *Dueñas*, and any objection would therefore have been futile.

Courts have addressed similar arguments with different results. In *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), Division Seven of this court held that the forfeiture rule did not apply to a defendant sentenced prior to *Dueñas* because no court had previously “held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant’s ability to pay.” (*Castellano*, at p. 489; accord, *People v. Johnson* (2019) 35 Cal.App.5th 134, 138.) In *People v. Frandsen* (2019) 33 Cal.App.5th 1126 (*Frandsen*), Division Eight of this court applied the forfeiture rule and disagreed with the defendant’s assertion that *Dueñas* constituted “‘a dramatic and unforeseen change in the law’” (*Frandsen*, at p. 1154; accord, *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464.)

More recently, the Fourth District, Division One, addressed the forfeiture argument in *Gutierrez, supra*, 35 Cal.App.5th 1027. In that case, the trial court imposed a restitution fine in the amount of \$10,000 and certain fees and assessments totaling

\$1,300. The court held that the defendant, who had been sentenced prior to *Dueñas*, had forfeited his right to raise an inability-to-pay argument on appeal by failing to raise the argument below. (*Gutierrez*, at p. 1029.)

The majority in *Gutierrez* declined to express its views on the correctness of *Dueñas* (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1032, fn. 11), and avoided the “perceived disagreement” between *Castellano* and *Frandsen* about the foreseeability of *Dueñas*, by finding forfeiture on another ground. (*Gutierrez*, at p. 1032 & fn. 11.) The court explained that the trial court had imposed a restitution fine greater than the statutory minimum; indeed, it had imposed the maximum amount permitted by statute. (*Id.* at p. 1033.)⁹ Because “even before *Dueñas*” section 1202.4 permitted the court to consider a defendant’s ability to pay when it imposed a fine above the statutory minimum, “a defendant had every incentive to object to imposition of a maximum restitution fine based on inability to pay.” (*Gutierrez*, at p. 1033; see also *Frandsen*, *supra*, 33 Cal.App.5th at p. 1154 [prior to *Dueñas*, an objection to a fine above the statutory minimum would not have been futile]; *Avila*, *supra*, 46 Cal.4th at p. 729 [defendant forfeited challenge to restitution fine greater than the minimum by failing to raise the argument below].) “Thus,” the *Gutierrez* court explained, “even if *Dueñas* was unforeseeable . . . , under the facts of

⁹ Justice Benke concurred in *Gutierrez* and wrote separately “to express [her] disagreement with *Dueñas*.” (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1034 (conc. opn. of Benke, J.)) *Dueñas*, Justice Benke stated, was fundamentally flawed in its analysis of constitutional principles and incorrectly applied California statutes. (*Gutierrez*, at p. 1038.)

this case [the defendant] forfeited any ability-to-pay argument regarding the restitution fine by failing to object.” (*Gutierrez*, at p. 1033.) Regarding the lesser sum imposed for other fees and assessments, the court stated that the defendant’s challenge to these amounts was also forfeited because, as “a practical matter, if [the defendant] chose not to object to a \$10,000 restitution fine based on an inability to pay, he surely would not complain on similar grounds regarding an additional \$1,300 in fees.” (*Ibid.*)

The *Gutierrez* court’s forfeiture rationale applies here. Because the court imposed a \$5,000 restitution fine—an amount far greater than the \$300 statutory minimum—defendant had the right, even before *Dueñas*, to request that the court consider his inability to pay that amount and “had every incentive” to do so. (*Gutierrez*, *supra*, 35 Cal.App.5th at p. 1033.) Because he failed to raise his inability to pay the \$5,000 fine, defendant, like the defendant in *Gutierrez*, “surely would not complain on similar grounds” as to the relatively insignificant assessments totaling \$70 or a stayed parole revocation fine. (*Ibid.*; see also *Frandsen*, *supra*, 33 Cal.App.5th at p. 1154 [because the defendant failed to object to \$10,000 restitution fine based on inability to pay, he failed on appeal to show “a basis to vacate assessments totaling \$120 for inability to pay”].) We therefore conclude that defendant has forfeited his arguments challenging these assessments and restitution fine.

DISPOSITION

The judgment on count 2 is modified by imposing and staying sentence on the assault charge and the section 12022.7 enhancement. The judgment is further modified to strike the section 12022, subdivision (b)(1) enhancement on count 1. As modified, the judgment is affirmed.

Upon remand, the trial court shall determine whether to strike the enhancement imposed under section 667, subdivision (a)(1). If the court strikes the section 667 subdivision (a)(1) enhancement, the court may reconsider the entire sentence. The court shall forward an amended abstract of the modified judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANNEY, J.